ORIGINAL

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER, Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the First Circuit

RESPONDENT DYER'S REPLY TO MEMORANDUM IN OPPOSITION TO HIS MOTION TO DISMISS THE WRIT AS IMPROVIDENTLY GRANTED

Respondent Dyer has moved this Court to dismiss the writ, as to him, as improvidently granted, because the judgment of the court below would have to be affirmed regardless of this Court's ruling on the Question Presented.

1. The United States opposes the motion to dismiss by reference to this Court's cases limiting the circumstances under which a respondent may seek affirmance on alternate grounds. Mem. Opp. at 2-3. Our motion does suggest that affirmance on the stated alternate ground would be appropriate if dismissal of the writ is denied, but that is not the relief the motion primarily seeks. A suggestion for dismissal of the writ as improvidently granted, on the basis that an alternate ground of affirmance has belatedly appeared, does not present the same

8 pp

considerations in a precedent-setting Court with a discretionary docket as does a request to affirm on the merits on a ground other than that which the Court agreed to review on certiorari. See Robert L. Stern, Eugene Gressman, et al., Supreme Court Practice § 5.15, at 260 (7th ed. 1993). The prudential concerns presented by the present motion are therefore not like those involved in the cases cited by the government, where a respondent seeks a ruling from this Court on the merits of an issue either not developed or even waived in the lower courts, or on which certiorari could have been but was not granted. Necessarily, this Court exercises a certiorari-like discretion whether to entertain such arguments.

2. While the United States may be "seek[ing] invalidation" of Amendment 506 "altogether, not as applied to specific cases," Mem. Opp. at 3, respondent Dyer's present motion shows that the Amendment is not even arguably invalid as to some cases, such as his. The Court would have no warrant in striking down the Amendment as applied to such cases. But even if the government's all-or-nothing position is arguable, that is not the argument this Court agreed to resolve when it granted certiorari in LaBonte. The government's Memorandum thus shows not that our motion should be denied, but rather confirms that, as to Dyer, the writ should be dismissed.

If this Court holds the definitional commentary to USSG § 4B1.1 invalid under 28 U.S.C. § 994(h) (which, of course, we argue it should not), it will still be for the Commission, not the Court, to decide how to define the "categories" that should

then be deemed to fall within certain guideline ranges, and thus which career offenders should be treated alike and which differently, as well as to decide what terminology to use in that guideline and how those terms should be defined. See Stinson v. United States, 508 U.S. 36 (1993). Thus, as we argued in Point III of our brief, we agree that the Court should not rewrite a guideline that it finds invalid. If the government prevails in this case, by invalidating the definition of a key term the Commission used in USSG § 4B1.1, the Court will (under Stinson) have struck down the guideline as to those affected by the invalidity. This Court need not be concerned with how the career offender guideline should then be "redrafted," Mem. Opp. at 5; that task will be for the Commission, in its expertise and discretion, to undertake.

3. The government's final contention in opposition to respondent Dyer's motion seeks to recast and reargue the merits of the petitioner's case in an even more extravagant form than in its brief or at argument. These contentions are misguided in several important respects.

a. First, because the Sentencing Commission is not required by 28 U.S.C. § 994(h) (or any other statutory provision) to treat as career offenders defendants, such as respondent Dyer, convicted only of conspiracy, any restrictions imposed by § 994(h) are not applicable to such defendants. The Commission is not required by any law to link sentences for defendants convicted of conspiracy to statutory maximums at all. The Commission can use any formula it chooses to determine the

applicable guideline range for such defendants. The Commission's decision that sentences for such defendant will be based on the greater of the normal guideline range applicable to the defendant or a career offender level pegged to the unenhanced statutory maximum is a matter solely within the Commission's discretion and authority under 28 U.S.C. § 994(a).

b. Second, the government's broader point, that "Prosecutorial discretion is a legitimate and necessary aspect of criminal law enforcement, and the Sentencing Commission was not charged with eliminating its effects" (Mem. Opp. at 5, citing no authority), is wrong and misleading. In enacting the Sentencing Reform Act, Congress was concerned with sentencing disparity, whatever the cause, and charged the Sentencing Commission with determining what sorts of disparity are "unwarranted." Congress was specifically concerned, inter alia, with the effects of prosecutorial discretion and the ability of prosecutors to "undermine" the sentencing guidelines. S. Rep. No. 98-225, 98th Cong. 1st Sess. 63 (1983). As a result, Congress included in the Sentencing Reform Act a directive to the Sentencing Commission to issue policy statements regarding a court's authority to accept or reject a plea agreement. 28 U.S.C. § 994(a)(2)(E).

The Sentencing Commission has also taken a series of steps, central to the guidelines, to reduce the effect of prosecutorial discretion. These include the relevant conduct rules of USSG § 1B1.3, the rules calling generally for concurrent sentences regardless of the number of counts charged (USSG §§ 5G1.2(c),

5G1.3(b)[1]), and the grouping rules of chapter 3, part D. They also include the many "real offense" modifications of the guidelines' "conviction offense" starting point, and the encouragement of departures to nullify the effects of the prosecutor's "inappropriate manipulation of the indictment." USSG, ch. 1, pt. A(4)(a).[2]

The point is not that prosecutorial discretion is invalid. Like judicial discretion, prosecutorial discretion is lawful and generally appropriate. However, a guideline system that ignored otherwise-lawful prosecutorial discretion as a source of unwarranted disparity would make no more sense than a system that ignored and failed to control judicial discretion. Adoption of the government's position, as stated in its Memorandum in Opposition, would severely undermine the entire guidelines system and cripple the Commission's legitimate authority.

c. Under Amendment 506, prosecutors retain unfettered discretion to decide whether to seek an enhanced maximum under 21 U.S.C. § 851, but that section does not and never did operate to require a judge in any case to impose a higher sentence. And even if this Court reverses the First Circuit, the Sentencing

---

[1] The propriety of these guidelines in their restraining effect on lawful prosecutorial charging decisions was discussed by this Court with approval in United States v. Witte, 515 U.S. --, 115 S.Ct. 2199, 132 L.Ed.2d 351, 366-67 (1995).

[2] See generally Resp. Br. 13-14 & nn. 5-6; U.S. Sent. Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining (December 1991).

Commission is not bound to base sentences on such enhanced maximums for defendants not required to be defined as career offenders by 28 U.S.C. § 994(h). If the prosecutor has the ability, in effect, to mandate a sentence at or near the enhanced maximum, this power comes only from § 994(h) (this is the question presented to the Court in this case). Where § 994(h) does not apply, the Sentencing Commission's decision to base sentences on unenhanced maximums interferes with no power even arguably given to the prosecutor.

For these reasons, as suggested in respondent Dyer's motion, the writ was improvidently granted and should be dismissed as to him.

Respectfully submitted,

Dated: January 15, 1997

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Counsel for Respondent Dyer

Of Counsel:
DAVID N. YELLEN
Hofstra Univ. School of Law
Hempstead, NY 11550

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER, Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the First Circuit

CERTIFICATE OF SERVICE

Pursuant to this Court's Rules 29.2 and 29.5(b), I certify that I am a member of the Bar of this Court, representing the respondent Dyer by appointment of this Court pursuant to 18 U.S.C. § 3006A(d)(6). I further certify that:

1. On January 15, 1997, I submitted the original of the Respondent's Reply to Memorandum in Opposition to Motion to Dismiss the Writ by facsimile and first class mail, properly addressed to the Clerk of this Court, for filing.

2. I further certify that on January 15, 1997, at the time of submission for filing, as permitted by Rule 29.3, I served Respondent Dyer's Reply on counsel for the petitioner, the

United States, Michael Dreeben, Esquire, Deputy Solicitor General, whose telephone number is 202-514-4285, by fax (202-307-4613) and first class mail, postage prepaid, addressed to:

Michael Dreeben, Esquire,
Deputy Solicitor General
Malcolm L. Stewart, Esquire
Assistant to the Solicitor General
U.S. Dept. of Justice, rm. 5614
10th St. & Constitution Ave., NW
Washington, DC 20530

A copy was also sent by first class mail to each attorney of record for the other respondents, as follows:

John A. Ciraldo, Esq.
PERKINS, THOMPSON,
HINCKLEY & KEDDY, P.A.
One Canal Plaza
P.O. Box 426
Portland, ME 04112-0426

(207) 774-2635

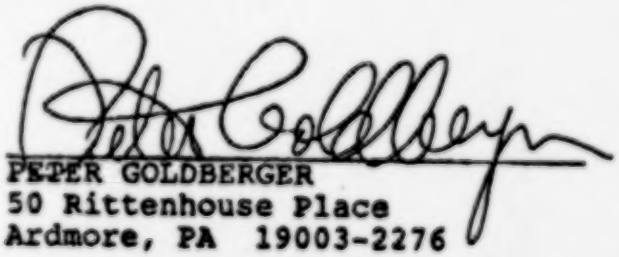
Attorney for George LaBonte

Michael C. Bourbeau, Esq.
BOURBEAU & BOURBEAU,
BONILLA & TOCCHIO, P.A.
50 Beacon Street, 4th Fl.
Boston, MA 02108

(617) 367-9695

Attorney for Alfred Hunnewell

As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.



PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Counsel for Respondent Dyer